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No. 971

In the Supreme Court of the United States

OCTOBER TERM, 1946

FRANK LOTTO AND JOSEPH RAYMOND CULLOTTA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals (R. 320–332) is reported at 157 F. 2d 623.

JURISDICTION

The judgment of the circuit court of appeals was entered October 22, 1946 (R. 332–333), and a petition for rehearing (R. 337–347) was denied December 4, 1946 (R. 349). On December 30, 1946, by order of Mr. Justice Rutledge, the time for filing a petition for a writ of certiorari was

[1] Opposing counsel have confirmed advice received from the United States Attorney that Cullotta died after the petition for a writ of certiorari was filed.

extended to February 1, 1947 (R. 356), and the petition was filed January 31, 1947. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

The only questions raised by the petition for a writ of certiorari which need be considered here in view of Cullotta's death after the filing of the petition for a writ of certiorari are:[2]

1. Whether, in view of the rationing regulations, it was necessary for the Government to offer proof that the gasoline ration coupons were property of the United States.

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[2] One of the contentions urged in the petition for a writ of certiorari is that the stolen ration coupons were discovered as the result of an unlawful search and seizure of Cullotta's automobile. It is clear that since Lotto, the surviving petitioner, had no interest in the vehicle (see R. 68), he is in no position to complain of the seizure and use of the evidence at the trial. See *Goldstein* v. *United States*, 316 U. S. 114, 121. It is also clear that the cause has abated as to Cullotta by reason of his death. The authorities are divided as to whether the prosecution is abated *ab initio* in such a situation or only as to the appellate proceedings. Under the former view, which apparently represents the weight of authority, the judgment against Cullotta (*infra*, pp. 6–7) even as to costs, is unenforceable. Some authorities hold that while costs constitute a liability against the estate, the appeal is nevertheless abated, with the result that the merits of the conviction are not reviewed on appeal. There are a few au-

2. Whether gasoline ration coupons which had been transferred one or more times in exchange for gasoline, but which still had not fully served their purpose in the administration of the rationing program, could be the subjects of theft under Section 46 of the Criminal Code.

STATUTE AND REGULATIONS INVOLVED

Section 46 of the Criminal Code (18 U. S. C. 99) provides:

> Whoever shall rob another of any kind or description of personal property belonging to the United States, or shall feloniously take and carry away the same, shall be fined not more than $5,000, or imprisoned not more than ten years, or both.

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thorities to the effect that where costs are involved, the conviction may be reviewed on the merits. The authorities are reviewed in 96 A. L. R. 1322. In *United States* v. *Johnson*, 319 U. S. 503, 520, note 1, this Court dismissed the writ as to Flanagan, who died after the case came here, and left the disposition of the fine imposed on him to the circuit court of appeals, citing *United States* v. *Pomeroy*, 152 Fed. 279 (C. C., S. D. N. Y.), reversed on another ground *sub. nom. United States* v. *New York Cent. & H. R. R. Co.*, 164 Fed. 324 (C. C. A. 2). In the *Pomeroy* case, the court held that upon the death of the accused after judgment all proceedings and the judgment are abated. See also *United States* v. *Dunne*, 173 Fed. 254 (C. C. A. 9); *Singer* v. *United States*, 323 U. S. 338, 346.

In any event, the opinion below clearly demonstrates that the search was not a federal undertaking (R. 321–324). Moreover, it is plain from the evidence as reviewed in the opinion (R. 321–322) that there was probable cause justifying the search.

Revised Ration Order 5C (10 F. R. 4858 *et seq.*), the gasoline ration order, provided in pertinent part as of May 26, 1945:

> § 1394.8104 *Coupon books property of Office of Price Administration; summary revocations.*—(a) All * * * coupons * * * are, and when issued shall remain, the property of the Office of Price Administration. The Office of Price Administration may * * * recall any ration and may require the surrender and return of any * * * coupon * * *, whenever it deems it to be in the public interest to do so.
>
> * * * * *
>
> § 1394.8177 *Rations not transferable.*
>
> * * * * *
>
> (c) No person shall have in his possession any * * * coupon * * * except the person, or the agent of the person, to whom such * * * coupon * * * was issued or by whom it was acquired in accordance with the provisions of this order.
>
> * * * * *
>
> § 1394.8235 *Inspection of records, facilities, coupon books, folders and other evidences.*
>
> * * * * *
>
> (b) All * * * coupons * * * are, and when issued shall remain the property of the Office of Price Administration. Upon demand made by any investigator of the Office of Price Administration or by any police officer, constable, or other law en-

forcement officer of the United States or of any state, county, or local government, every person shall produce for inspection any * * * coupons * * * in his possession or control, whether valid, invalid, void or expired and whether or not issued or acquired in accordance with this order. Investigators of the Office of Price Administration and all police officers, constables and other law enforcement officers of the United States or of any state, county or local government are authorized to make such inquiries of any person as may be pertinent to determine whether a violation of this order has been or is being committed, and are authorized to receive the surrender of all * * * coupons * * * acquired by any person otherwise than in accordance with this order, whether valid, invalid, void or expired.

* * * * *

Section 2.6 of General Ration Order No. 8, as amended (8 F. R. 3783; *id.*, 9626; 9 F. R. 2746), provided in pertinent part as of May 26, 1945:

* * * * *

SEC. 2.6 *Acquisition, use, transfer or possession of ration document.*—No person shall * * * possess * * * a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. * * *.

STATEMENT

On June 19, 1945, an indictment in ten counts was returned against Lotto and Cullotta in the District Court for the Northern District of Iowa (R. 1–11). Counts 1 to 7, inclusive, charged that they had in their possession, in violation of the Second War Powers Act, 50 U. S. C. App., Supp. V, 633, and of Section 1394.8177 (c) of Revised Ration Order 5C and Section 2.6 of General Ration Order No. 8, specified quantities of stolen gasoline ration coupons (R. 2–8). These counts were consolidated at the close of the Government's case (R. 243–244). Counts 8, 9, and 10 charged the defendants with the theft, on May 26, 1945, from the temporary lawful possession of Oscar Rosel, Lawrence Rosenberg, and Ray Crispin, respectively, of gasoline ration coupons, personal property belonging to the United States, in violation of Section 46 of the Criminal Code (*supra*, p. 3) (R. 8–11).

After a trial by jury, each defendant was found guilty of the charge of illegal possesion of the coupons (counts 1 to 7, consolidated) as well as on the theft counts (8, 9, and 10) (R. 15–16). Lotto was sentenced to imprisonment for one year on the consolidated counts and for five years on each of counts 8, 9, and 10, the sentences on all the counts to run concurrently (R. 27–28). Cullotta was sentenced to imprisonment for one year on the consolidated counts and for seven years on

each of counts 8, 9, and 10, the sentences on all the counts likewise to run concurrently (R. 28–29). Each defendant was, in addition, ordered to pay costs in the amount of $478.49 (R. 28, 29). On appeal to the Circuit Court of Appeals for the Eighth Circuit, the judgments of conviction were affirmed (R. 332–333).

In view of Cullotta's death and the nature of the contentions remaining in the case, it is unnecessary to recite the evidence adduced at the trial. The nature of the proof is indicated in the opinion below (R. 325–326).

ARGUMENT

1. It is urged in the petition for a writ of certiorari that the motions for directed verdicts of not guilty on counts 8, 9, and 10 were erroneously denied because the Government failed to prove that the gasoline coupons alleged in those counts to be personal property belonging to the United States and to have been stolen by the defendants were in fact government property, a jurisdictional requisite under Section 46 of the Criminal Code, on which the counts were predicated (Pet. 7, 9, 18, 20). This was clearly unnecessary because under the rationing regulations (*supra,* pp. 4–5) the coupons "never became the private property of the holder but remained at all times the property of the Government and subject to inspection and recall by it." *Davis* v. *United States,* 328 U. S. 582, 588. This likewise

disposes of the essentially identical contentions (Pet. 8, 9–10, 21–22, 23–24) that the trial court "invaded the province of the jury on a matter vitally in dispute" by instructing them (Instruction No. 7, R. 18) that "During the month of May, 1945, gasoline ration coupons were personal property belonging to the United States Government," and that the court erroneously failed, in Instructions 14–19 (R. 21–25), to require the jury to find as a condition of convicting the defendants on counts 8, 9, and 10 that the coupons allegedly stolen by them were in fact government property. It may be observed, moreover, that no objection to Instructions 14–19 was registered at the trial (see R. 313, 331).[3]

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[3] The contention that there was a fatal failure to prove, in respect of counts 8, 9, and 10, that the coupons stolen had ever been issued by an officer or agency of the United States (Pet. 20) is, we think, adequately disposed of in the opinion below (R. 330). The contention that the Government failed to prove that the coupons involved in those counts were ever lawfully acquired by the persons from whom they were allegedly stolen (Pet. 19) erroneously assumes the materiality of that question and, in addition, ignores the uncontroverted testimony of all the victims that they received the coupons from regular customers in the regular course of business (R. 79–84, 104–107, 119–121, 131–133, 136–139, 155–157, 175–185). In view of the testimony of all seven of the theft victims that the coupons, of which they had lawful custody, were taken from their trucks without their knowledge or consent (R. 83–85, 118, 123–124, 134–135, 140–142, 160–161, 179–181), the contention that the Government was further required to prove that the United States did not consent to the asportation of the coupons (Pet. 19, 20) can scarcely be taken seriously.

2. It is further contended that the motions for directed verdicts of not guilty on all counts were erroneously denied because the evidence established that the gasoline coupons involved, "before being acquired by [the defendants], had been given, transferred and endorsed by the holders of said stamps for the delivery of gasoline and were not useable, transferable or assignable by [the defendants] after acquisition of the same" (Pet. 19); or, as the contention is elsewhere phrased, the coupons had been "used, cancelled and disfigured," had "served their purpose" (Pet. 9), and "were of no value and not the subject of larceny" (Pet. 18). The contention is without merit.

In the first place, Section 46 of the Criminal Code (*supra*, p. 3), on which counts 8, 9, and 10, the theft counts, were based, proscribes the theft of "any kind or description of personal property belonging to the United States" and does not make the offense depend upon value. *Donegan* v. *United States*, 287 Fed. 641, 646 (C. C. A. 2), certiorari denied, 260 U. S. 751; see also *Jolly* v. *United States*, 170 U. S. 402, 405; *Clark* v. *United States*, 268 Fed. 329, 331 (C. C. A. 6); *Keller* v. *United States*, 168 Fed. 697 (C. C. A. 7).

But in any event, the assertion that the stolen coupons in this case were valueless and useless ignores realities. It is true that all the coupons had been transferred at least once in exchange

for gasoline, and that some (those surrendered by the operators of filling stations) had been transferred twice—by purchasers of gasoline at the filling stations to the station operators, and by the latter to the bulk gasoline distributors from whom they were stolen (R. 82, 104–107, 119–121, 131–133, 136–139, 155–157, 175–178). It cannot be concluded from this, however, that the coupons had fully served their administrative purpose or were of no value. Gasoline ration coupons were at all times, after as well as before issuance, government property, and remained subject to inspection and recall by the Government. They constituted the primary evidence, subject to inspection by the Government, of the sales made by a dealer or distributor in exchange for coupons. *Davis* v. *United States, supra;* see Revised Ration Order 5C, §§ 1394.8211 (10 F. R. 4897), 1394.8217 (*id.,* 4899), and 1394.8218 (*ibid.*). Dealers and distributors were held accountable for all coupons received by them. Revised Ration Order 5C, § 1394.8217, *supra.* Bulk distributors, such as those from whom the coupons involved in this case were stolen, needed the coupons surrendered to them by their customers in order to acquire equivalent gallonages of replenishment gasoline from their suppliers, either by direct transfer of the coupons or by depositing them in ration bank accounts upon which they could draw ration

checks to be used in exchange for gasoline. See Revised Ration Order 5C, §§ 1394.8206a (10 F. R. 4894), 1394.8206b (*ibid.*), 1394.8206c (*id.*, 4895), 1394.8207 (*id.*, 4896), 1394.8211 (*supra*), 1394.8217 (*supra*), and 1394.8218 (*supra*); *Davis* v. *United States, supra;* cf. *United States* v. *Simonds,* 148 F. 2d 177 (C. C. A. 2). Consequently, it would be idle to suggest that the coupons were valueless or useless because they had served their administrative purpose.

Nor can it be argued that the coupons were of no value to the defendants, even if this were material. By misrepresentation and deception they could have used the coupons for the same purposes as the distributors from whom they were stolen needed them, or at least they could have sold them to other distributors who could, by such misrepresentation, have used them for such purposes. See *United States* v. *Simonds, supra,* where just such a scheme was involved.[4]

[4] The petition also makes a number of contentions which have reference solely to the consolidated counts (1 to 7), charging unlawful possession of the coupons involved. In view of the fact that the sentences of one year on those counts were made to run concurrently with the longer (concurrent) sentences on counts 8, 9, 10, the theft counts (see pp. 6–7, *supra*), these contentions need not be considered, since, as are here shown, the theft convictions are valid. *Pinkerton* v. *United States*, 328 U. S. 640, 641–642, fn. 1; *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105.

CONCLUSION

The judgment below is correct, and there is no conflict of decisions involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.

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